

Claimant, Jose Humberto Perez Luna, worked as a roofer for his cousins, Juan Manuel Perez and Jime (a.k.a. James) Perez. Manuel Perez and Jime Perez subcontracted work from respondent K D Roofing, Inc. Although respondent alleged it required its subcontractors to have workers compensation insurance, it was determined after this claim was filed that Jime and Manuel Perez did not have workers compensation insurance. Hence, this claim was brought against respondent as the principal contractor.

Richard Hallum, respondent's manager, describes making regular trips to the job site and being in frequent contact with Jime and Manuel Perez, but says he was not informed of claimant's accident by the Perez brothers or by any of the other subcontractors at the job site. Given the severity of the accident and claimant's injuries, this seems implausible. Manuel Perez said he told Mr. Hallum about the accident the following day. Jime Perez testified he only dealt with an individual named Ricardo, whom he described as the area manager for K D Roofing. Jime Perez also testified that he spoke with Ricardo about the accident a day or two after it happened and Ricardo had already heard about it from others. Although it is not made clear in the record, most likely Richard Hallum and Ricardo are the same person.

There are a number of other inconsistencies in the record, including the date that claimant alleges he was injured when he fell from a roof. In support of his claim, a large number of medical records were introduced at the preliminary hearing that refer to an individual named Gerardo Gutierrez with a different age and date of birth than claimant. But, it is alleged that these records actually pertain to claimant. According to claimant and his cousins, the hospital was given a false name because claimant was an illegal alien working under a false social security number. These records from the University of Nebraska emergency room, however, are dated July 29, 1997 and refer to an injury having occurred on that same day. Claimant alleges a July 28, 1997 accident. He further alleges that he was taken directly to the hospital by his cousin and brother. Claimant testified he was rendered unconscious and therefore does not recall much of the accident.

Even though the medical records are under a different name, the claimant's testimony and that of Manuel and Jime Perez establish that those are the claimant's records. They are obviously consistent with claimant's injuries.

Based upon the record compiled to date, the Appeals Board finds claimant has proven that he suffered accidental injury arising out of and in the course of his employment with respondent.

Respondent also raises the defense that claimant failed to use required safety equipment. Claimant and Manuel Perez both denied there was any such safety equipment available at the job site. Furthermore, there is no evidence that claimant was ever instructed to use safety equipment either by respondent or by his immediate employer. Accordingly, K.S.A. 1996 Supp. 44-501(a)(1) is not a bar to this claim.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the July 2, 1998 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

- c: Joseph Seiwert, Wichita, KS
 Richard J. Liby, Wichita, KS
 Nelsonna Potts Barnes, Administrative Law Judge
 Philip S. Harness, Director